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No. 939

In the

Supreme Court of the United States

JUNE KEGLEY, a Widow,

Petitioner,

v.

AETNA LIFE INSURANCE COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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To the Honorable Mr. Justice Warren, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Mrs. June Kegley, a widow, for and in behalf of herself and her minor children prays that a Writ of Certiorari issue to review the action and the judgment of the United States Court of Appeals for the Fifth Circuit, entered on August 15, 1967. Petition for rehearing was denied on October 9, 1967.

I.

OPINIONS OF THE COURT BELOW

The opinion of the Court of Appeals is printed in Appendix "A" hereto and has not yet been reported.

II.

JURISDICTION

The judgment of the Court of Appeals was entered on August 15, 1967. Rehearing was denied on October 9, 1967. The jurisdiction of this Court is invoked under Article 28, U.S.C., Sec. 1254 (1).

III.

QUESTIONS PRESENTED

1. Whether a Court of Appeals may render a judgment in a diversity case, applying substantive law which is in direct conflict with the law of the State from which the case was appealed as declared by the Supreme Court of the state.

2. Whether a Circuit Court of Appeals may reverse and render the judgment of the Trial Court and hold as a matter of law in so doing that evidence did not raise issues of fact for the jury without denying to Petitioner a trial by jury as required by the Seventh Amendment to the Constitution of the United States in a case in which fact issues for the jury were clearly raised by an overwhelming preponderance of the evidence.

3. Whether a Circuit Court of Appeals can disregard evidence showing that same was an accidental personal injury followed by a visible contusion and wound as required by the terms of the policy and then render said judgment.

4. Whether a Circuit Court of Appeals can disregard the facts and make an independent investigation of the facts and assume from the defendant's medical witness that the testimony of said witness alone is true when the testimony of said witness is based upon hypothetical evidence assuming facts not in evidence.

5. Whether the Court of Appeals could ignore the evidence of Dr. Homan that a wound is visible evidence of injury as required by the terms of the policy.

6. Whether the Circuit Court of Appeals has violated Petitioner's constitutional right to have her case decided by the law of Texas in a case where the Court of Appeals refused to consider the Texas cases on the question and in the face of the opinion shows that the Court of Appeals assumes that the Supreme Court of Texas would not follow the Texas decisions, whereas under the Constitution and authority of this Honorable Court in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 82 L. Ed. 1188 (1938), the Court of Appeals was bound to follow the Texas rule.

7. Whether a Circuit Court of Appeals can depart from prior holdings of the Fifth Circuit and from the well established law of Texas by disregarding cases both in Texas and

in the Fifth Circuit that were in support of the judgment of the Trial Court.

8. Whether the question of causation with reference to death is a matter for competent medical evidence or whether the Court of Appeals is justified in making their own findings from consultation with dictionaries and from relying on quotations of testimony from one of Respondent's witnesses that assumed facts not in evidence in this cause, the evidence of the expert being inadmissible as a matter of law.

9. Whether in cases of policies of insurance such as this any uncertainties and ambiguities in such policies are to be determined in favor of the policy holder, Petitioner herein, by the application of ordinary rules of construction and the intention of the parties and whether such policies shall be construed strictly against the insurer and liberally in favor of insured so as to affect the dominant purpose of the contract of insurance.

10. Whether if conditions, exceptions and exemptions from or limitations of liability of the insurer are not plainly expressed they will be construed against the insurer when under Texas law the policy terms are such that at the time the Respondent collected the premiums Petitioners had the right to assume that they would be covered by the accidental injuries causing death provisions of the policy as applied to the facts of this case.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

1. The Constitutional provision involved in this case is the Seventh Amendment to the Constitution of the United States reading as follows:

> "In suits at common law, where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

2. The statutory provision involved in this case is the Rules of Decision Act, 28 U.S.C., Sec. 1652 which reads as follows:

> "The laws of the several states, except where the Constitution or treaties of the United States or acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the Courts of the United States, in cases where they apply."

V.

STATEMENT

This is a diversity of citizenship case filed by the widow and surviving children of Joseph Felix Kegley against the Respondent herein on a group policy issued to the Halliburton Company by Respondent and a certificate of insurance issued to the deceased employee, Joseph Felix Kegley.

The group policy issued to Halliburton Company and the certificate of insurance issued to the deceased employee, Joseph Felix Kegley, provided for death benefits of $75,000.00

under a specific, limited coverage only. The pertinent provisions of the policy state:

"ARTICLE II—BENEFITS

Section 1—Special Accidental Death and Dismemberment Benefits:

If an employee suffers a bodily injury caused by an accident and as a direct result of such injury, and, to the exclusion of all other causes, sustains within not more than 90 days after the date of the accident which causes such injury any of the losses listed in the Table of Benefits in this section, then provided:

(a) The injury occurs while insurance is in force for the employee under this policy; and

(b) The injury is evidenced by one or more visible contusions or wounds on the exterior of the body, except in the case of drowning; and

(c) The loss resulting from the injury is not excluded from coverage in accordance with Section 3 of this Article;

The Insurance Company shall, subject to the terms of this policy, pay with respect to such loss a benefit determined from said Table of Benefits and based upon the Principal Sum for which the employee was insured on the date of said accident but in no case shall more than the Principal Sum be paid for all losses sustained by an employee through any one accident.

Table of Benefits

In the event of Loss of Life	The Benefit Will be the Principal Sum

* * *

Section 3. Exclusion:

No insurance is provided and no benefits shall be payable under Section 1 of this Article with respect to any

loss or under Section 2 of this Article with respect to disability terminating in death if the loss under Section 1 or the disability under Section 2, or any injury from which such loss or disability results, is caused or contributed to by, or is a consequence of, or is in any way attributable to, any of the following excluded risks, even though the proximate or precipitating cause of said loss or disability is a bodily injury caused by an accident:

(a) Bodily or mental infirmity; or

(b) . . .

(c) Disease of any kind, except a pyogenic infection attributable solely to and occurring as the proximate result of an injury not excluded by this Article; . . ."

The deceased, Joseph Felix Kegley, was an employee of Halliburton Company. He died in Ward County, Texas, on December 30, 1961, at the age of 40 years (R. 184, 189, all references herein being to the page number in printed record). Mr. Kegley's position with Halliburton was described as a treater (R. 65), a cementer (R. 108) and a supervising foreman of the frac crews (R. 139). Most of his work was done outside. It involved some physical and muscular exercise (R. 134) but he acted primarily in a supervisory capacity (R. 139, 141-142, 253). He would see that the necessary equipment got out of the Halliburton yard and set up on location in time to do the particular job required (R. 65, 108, 139, 142). He also monitored certain equipment during the time the job was run (R. 242-243).

Mr. Kegley was described as industrious, a good hand and a hard working man (R. 65, 109, 127). He appeared to be in good health (R. 109, 140, 147).

In connection with the record of the evidence in this case, we would show that the Respondent laid behind the log and it was not until the Trial Court required the Respondent to produce the work records of the deceased, Joseph Felix Kegley, that we were able to get a true situation as to the over exertion in which Kegley indulged during the period of time involved which resulted in an accidental injury proximately causing a coronary occlusion evidenced by a visible contusion or wound.

The Court in reading the record will note that the evidence of Dr. Homan was much stronger than the first two hypothetical questions propounded to the other witnesses, the treating physician, Dr. Prout and Dr. Tull of Abilene, and the hypothetical question which sets forth the evidence required Dr. Homan to assume that based on said work records the true fact situation was as follows:

> "Q. . . . I want you to assume that following the Christmas holidays on December 26th of '61 that he, according to Ticket No. 283753, in Vehicle No. 12696, and Employee No. 6250, that he on that day spent ten and a half hours at work, six hours of which was spent in loading and unloading and breaking out pipe in the yard, that he had to get up real early to go do this or would have to do it at night after they finished work so that they would have the chemicals to do the frac jobs that they were specialists in doing, and that according to the job or the demands of the job, why, they would (338) have from forty to one hundred fifty sacks of salt alone weighing a hundred pounds and had some other sacks of various other chemicals that weighed fifty or more pounds, and that the members of that crew, including Kegley, was observed lifting this stuff up there and loading it into the truck, during these

three days previously, and that in addition to that, that they had two-inch and three-inch and four-inch pipe, twenty feet long, which we haven't been able to prove the weight of, but that has been described as being—by a man that had been an employee of Halliburton for years—as being very heavy pipe, that he had to lift that also; and then I want you to assume that after he got out on the job he would have to lift the pressure recorder weighing some fifty pounds out of the truck and then move a frac-o-meter, and then take this pipe and move it out of the truck that he had already loaded so that he could do the job and make a connection with the hose and the frac-o-meter and the other things that they were running pressure tests on after they got to the location; and then I want you to assume that on each day that as a part of his job that he even had to get up and watch a thing called a monitor and all of which time he would have to stand and be sure (339) that the pressure remained even, and that has been described as a very nerve-racking and tedious job by a fellow employee, and that on that particular day he spent two hours according to the running job ticket doing that, and then on that particular day, driving from camp to the job, one and a half hours; I want you to assume that during all this period of time beginning with December 26th, after the other employees got through work that he even had paper work to do as a supervisor of the gang in making reports to the company and other things that would take two or three hours that the others didn't have to do, they could just go home, and that even when he got home if he didn't do all of his paper work at the office he would have to do his paper work at home, and did do it. Then I want you to assume that beginning with this period that he became extremely exhausted averaging only four or five hours' sleep per night, and appeared to be very worried and tense and suffered from a great deal of anxiety, according to his wife; I want you to assume that he went through the

same kind of labor on 12-28-61 according to Ticket No. 283755. . . .

"Q. The second ticket is No. 283754, with the same employee number and the same vehicle number, and it shows that on that date that he spent seven hours helping load these heavy objects, the heavy pipe and the heavy salt, and then thereafter he spent one and a half hours standing out there monitoring the frac-o-meter, that he had to wait two hours on the location at the job, and he spent one hour driving from the job to the camp, or a total of twelve and a half hours. I want you to assume that according to Ticket No. 283755, same employee number and same vehicle number, with his occupation being listed all the way through as a cementer, and with the tickets being signed by his supervisor and signed by him personally, that he spent six and a half hours doing this heavy work of loading and unloading these heavy materials, and that on that particular day that he had to spend six (341) hours standing up in one position monitoring and watching, something that nobody else did except him, that tedious type of a situation, that he also had to wait an hour and a half after the job, and spent another two hours, one hour each way, driving from the camp to the job, for a total of sixteen hours. . . .

"Q. Now, I want you to assume that on December 29, 1961, according to Ticket No. L-283756—all of these tickets are listed with an "L" before the number, they all appear in consecutive order according to the numbers, same employee number and same vehicle number, this was the day before his death, that he worked a total of nineteen hours. Now, that doesn't include the time that it would take him to drive from the yard to his home or the time it would take him to drive from his home to the yard, but recognizing that there are only twenty-four hours in the day, it can be seen that he received very little sleep at night, and he was described, assume, as being very, very exhausted, and

dropped off to sleep in his chair with a pencil between his fingers, his wife said that he was a picture of complete exhaustion. I want you to assume (342) that after this hard day's labor of nineteen hours, not counting the time going home and back, that he complained the next morning of being very, very tired to fellow workmen; I want you to assume that on that day he had to spend six hours loading and unloading these heavy objects, but that on that particular day he had to do something else particularly strenuous and something that is listed as maintenance work, "Working on frac-o-meter," and which we know from the testimony of an employee by the name of Gibbs that a sledge hammer had to be used by someone, he doesn't know whether it was him or Kegley, but since they had to spend eight hours repairing this machine—no, three hours repairing the machine—apparently it required quite a lot of hammering; and I want you to assume that on that particular day he again for eight long hours had to stand in this one spot monitoring this machine to see that the pressure would stay right, that a half hour of that was waiting at the location for the job to begin, an hour of it was spent driving from the camp to the job, and a half hour was spent in driving from the job to the camp. Then on the day of his death I want you to assume that with the hour showing to begin at 5:00 o'clock, he for two hours engaged in this heavy lifting operation (343) and in loading and unloading those heavy pipes and those heavy sacks of chemicals and then he waited a half hour at the job, and spent an hour driving from the camp to the job; I want you to assume that during the period from five to seven o'clock or to eight o'clock he was engaged according to this ticket from five to eight o'clock in loading these heavy objects onto the truck, and then he drove to the job, waited there a half an hour, and within thirty minutes of the time that he had last lifted these heavy objects according to this time sheet he had a heart attack and died. Now,

the way it was noticed that he was preparing to have his heart attack was that he clutches on to the panel of the truck in such a way as to convince a co-worker by the name of Winkler that something seriously was wrong, and this Mr. Winkler turned and saw him standing there clutched to the truck and said, "Hey, Joe, what is wrong?" and with that he fell over. I want you to assume that an ambulance was called and that the ambulance operator when he got there felt his pulse and it was still beating, but that there was visible purple and blue discoloration apparent to everyone there around his lips and above them. Assume that he died enroute to the hospital where he was pronounced dead of coronary (344) thrombosis by Dr. Prout upon arrival. Assume that no autopsy was performed. Now, Doctor, I have tried to give you what the records written in this man's own handwriting showed (indicating), that he was doing during those days of his life together with the testimony of others that worked with him, together with the testimony of the widow who sits here in the Courtroom and who kissed him goodbye at five o'clock never to see him alive again. Now Doctor, assuming those facts to be true and correct, can you form an opinion as to the probable cause of this man's heart attack?"

Based upon this kind of evidence the Circuit Court of Appeals held that the evidence did not raise an issue of fact for the jury.

Indeed, the Fifth Circuit as shown by the Motion for Rehearing even refused to reverse and remand the case for newly discovered evidence and in order that justice might be done in a case where the Petitioners discovered that one of the deceased co-employees had observed contusions upon and about the face of deceased and had given a written

statement to Respondent so advising Respondent but had refused to disclose such evidence to Petitioner's attorney.

This is certainly not the search for truth and justice that we believe our courts and particularly this Court, the highest Court of our land, were created to maintain.

VI.

REASONS FOR GRANTING WRIT

1. The decision of the Court of Appeals is not in accord with applicable decisions of the Supreme Court of Texas.

The holdings complained of under the preceding statement and preceding questions are in direct conflict with the Supreme Court of Texas decisions on this subject as discussed under our Statement.

Since the Court of Civil Appeals did not follow the law of Texas a typical situation is presented in which this Honorable Court has on a number of occasions granted writs of certiorari.

Erie R. Co. v. Tompkins, 304 U.S. 64;
Russell v. Todd, 309 U.S. 280;
Wichita Royalty Co. v. City National Bank, 306 U.S. 103;
Guaranty Trust Co. v. York, 320 U.S. 99.
See also *Rules of Decision Act, U.S.C., Section 1652.*

Certiorari was also apparently granted by this Honorable Court for this reason in *Phillips Petroleum Co. v. Gibson*, 232 Fed. 2d 13, 1 L. Ed. 2d 77.

The granting of the writ by this Honorable Court in the *Gibson* case was a matter of great significance to the legal world and to all litigants in personal injury suits of the character here involved.

Following the decision of this Honorable Court in the *Gibson* case, supra, the United States Court of Appeals for the Ninth Circuit said:

> "In considering a case of this kind we should take note of the precedents established by the Supreme Court when it is proper to take a case from the jury. For although, this is a diversity case, it was tried in a federal court where considerations relating to the Seventh Amendment must prevail." *Smith v. Rusk*, 245 Fed. 2d 348.

Citing with approval *Gibson v. Phillips Petroleum Co.*, 352 U.S. 874 and *Reynolds v. Pegler*, 223 Fed. 2d 429.

Professor Leon Green in an illuminating article entitled: "Protection of Jury Trial in Diversity cases." June, 1957 Texas Law Review has this to say about the action of this Honorable Court in the *Gibson* case, supra:

> "The conclusion is that the Supreme Court was not willing to go along with the Texas Court in the determination of this issue as a matter of law by virtue of the local doctrine.
>
> "No doubt the controlling matter here is the attitude of the Supreme Court towards the protection of jury trial under the 7th Amendment. The doctrine of the Texas Court is a transparent device to syphon off the powers of the jury by converting a question of fact into a question of law."

On Page 770 Professor Green continues:

> "Thus, under the Supreme Court decision it would seem that when the right of jury trial in the federal court collides with Erie v. Tompkins, the Supreme Court as in the F.E.L.A. cases will stick with jury trial and not allow practices of any type designed to deprive a litigant of his Constitutional right."

Citing *Dice v. Akron C. & Y. R.R.*, 342 U.S. 359, and *Brown v. Western Ry. Co.*, 338 U.S. 294.

Professor Green continues, page 770:

> "How far the Supreme Court is prepared to go in protecting jury trials in common law cases in the federal courts against state court invasions is an interesting question, and one highly important to litigants in the area of personal injuries."

Professor Green of the law faculty of the University of Texas agrees with the action of this Honorable Court in the *Gibson* case with these remarks:

> "In Texas, especially by virtue of its complex proximate cause and negligence per se doctrines, buttressed by intricate and numerous special issues, jury trial has been greatly impaired." Citing *Arnold v. Panhandle & Santa Fe Ry. Co.*, 77 Sup. Ct. 840.

However, in this case, this is not our problem. In this case, the Court of Appeals tried to say that the Supreme Court of Texas would not follow the Supreme Court of Texas decision in *American National Insurance Co. v. Fox*, 184 S.W. 2d 937. We ask how far can a Circuit Court be permitted to go by this Court when they ignored the Erie decision by this Court that has never been overruled by this or any other Court since its adoption. Is the law of the

Supreme Court of the State of Texas controlling here or is the Erie decision subject to the whims, caprices, conjecture and speculation of the Fifth Circuit. If so, shouldn't this Court hold in effect that the Supreme Court of Texas has no right to determine the law of its own state in a case where no federal statutes or constitutional provisions are involved, save petitioners right to trial by jury.

2. The action of the Court of Appeals constituted an invasion of the province of the jury contrary to the Seventh Amendment of the United States Constitution.

E. G. Ives v. Grand Trunk R. Co., 638 S. Ct. 1077, 319 U.S. 372;

Schulz v. Pennsylvania R. Co., 76 Sup. Ct. 134 and 608

3. The questions here presented have great importance and far-reaching effect to the millions of policy holders throughout the United States whose bread winner might suffer death as a result of accidental personal injuries.

4. The opinion of the Fifth Circuit Court of Appeals in this case is in direct conflict with the following decisions. All of these matters and authorities were urged in Appellee's Brief in Support of Motion for Rehearing.

Home Ins. Co. of New York v. Tydal Co., et al, 157 F. 2d 851

Pruett v. Marshall, 283 F. 2d 436, 439

Badger Mutual Insurance Company v. Morgan, 313 F. 2d 783, 786

Hanover Fre Insurance Company v. Sides, 320 F. 2d 437 (1963)

Spach v. Monarch Insurance Company of Ohio, 309 F. 2d 949 (1962)

Royal Indennity Company v. Curtis, 256 F. 2d 329, 330

American Casualty Co. of Reading, Pa. v. Myrick, 304 F. 2d 179 (1962)

American National Insurance Co. v. Fox, 184 S.W. 2d 937

Warbende v Prudential Insurance Company of America, 97 F. 2d 749, Annotated 117 A.L.R. 799

Mutual Life Insurance Company of New York v. Schenkat, 62 F. 2d 236

Wiecking v. Phoenix Mutual Life Insurance Company, 116 F. 2d 90

Order of United Commercial Travelers v. Siever, 121 F. 2d 660

Stroehmann v. Mutual Life Ins. Co., 300 U.S. 435, 57 S. Ct. 607, 81 L. Ed. 732

Wendorff v. Missouri State Life Ins. Co., 318 Mo. 363, 1 S.W. 2d 99

Mathews v. Modern Woodmen of America, 236 Mo. 326, 139 S.W. 151, Ann. Cas. 1912 D, 483

Dezell v. Fidelity & Casualty Co., 176 Mo. 253, 75 S.W. 1102

State et rel. Mutual Benefit, Health & Accid. Ass'n. v. Trimble, 334 Mo. 920, 68 S.W. 2d 685

Carroll v. Magnolia Petroleum Company, 223 F. 2d 657 (5th Cir. 1955)

Even if we assume that petitioner is wrong in the statement that the Fifth Circuit has failed to follow the decisions of the Supreme Court of Texas, said Circuit Court has erred in applying Federal decisions and in violating the federal rules requiring jury trials in diversity cases where fact issues are raised as are here raised by the record in this cause. All recent decisions of the Fifth Circuit of the United States hold that the Seventh Amendment guarantying a jury trial would control *if a fact issue was raised under federal law as distinguished from state law.*

The Fifth Circuit recognizes this rule of law in its recent decision in ABC-Paramount Records, Inc. v. Topps Record Distributing Co., 374 F. 2d 455 (Reh. den. April 27, 1967), in the following language:

> "The federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction. An essential characteristic of that system is the manner in which, in civil common-law actions, *it distributes trial functions between judge and jury and under the influence—if not the command—of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury*, Jacob v. (City of) New York, 315 U.S. 752 (62 S. Ct. 854, 86 L. Ed. 1166). The policy of uniform enforcement of state-created rights and obligations, see e.g., Guaranty Trust Co. (of New York) v. York (US), supra, cannot in every case exact compliance with a state rule—not bound up with

rights and obligations—which disrupts the federal system of allocating functions between federal system of allocating functions between judge and jury. Herron v. Southern Pacific Co., 283 U.S. 91 (51 S. Ct. 383, 75 L. Ed. 857). Thus the inquiry here is whether the federal policy favoring jury decisions of disputed fact questions should yield to the state rule in the interest of furthering the objective that the litigation should not come out one way in the federal court and another way in the state court." 78 S. Ct. at 900-901, 2 L. Ed. 2d at 962-963.

"Byrd v. Blue Ridge Rural Electric Cooperative, 1958, 356 U.S. 525, 536-538, 78 S. St. 893, 900-901, 2 L. Ed. 2d 953, 962-963, reh. den. 357 U.S. 933, 78 S. Ct. 1366, 2 L. Ed. 2d 1375 (1958).

"(6) In *Byrd*, the Supreme Court held that *Erie* did not prevent the issue of whether Byrd was covered by workmen's compensation, which would be tried to a judge in a state trial, from being tried to a jury in a federal diversity case. The Court continued:

> 'It cannot be gainsaid that there is a strong federal policy against allowing state rules to disrupt the judge-jury relationship in the Federal courts.'

356 U.S. at 538, 78 S. Ct. at 901, 2 L. Ed. 2d at 963.

"(7, 8) In the present case, the federal courts' judge-jury relationship would suffer a similar disruption if the trial judge had to apply the Florida rather than the federal standard of sufficiency of evidence in determining whether to take away from the jury certain fact issues concerning damages. This Court has held repeatedly that '* * * in a diversity case, *state law controls as to the substantive elements of plaintiff's case and of defendant's defense, but the sufficiency of the evidence to raise a question of fact for the jury is controlled by federal law.*' Shirey v. Louisville & Nashville R. Co., 5 Cir. 1964, 327 F. 2d 549, 552; Melton v. Greyhound Corp., 5 Cir., 1965, 354 F. 2d 970; Kirby Lumber

Corp. v. White, 5 Cir. 1961, 288 F. 2d 566; Revlon, Inc. v. Buchanan, 5 Cir. 1959, 271 F. 2nd 795, 81 A.L.R. 2d 222; Reuter v. Eastern Air Lines, 5 Cir. 1955, 226 F. 2d 443."

One of the latest cases on the subject by this Honorable Court is the case of *Atlantic & Gulf Stevedores v. Ellerman Lines*, 369 U.S. 355, 7 L. Ed. 2d 798. Mr. Justice Douglas, speaking for the Court, said this in no uncertain terms:

> "This suit being in the federal courts by reason of diversity of citizenship carried with it, of course, the right to trial by jury. As in cases under the Jones Act (Schulz v. Pennsylvania R. Co. 350 US 523, 100 L ed 668, 76 S Ct 608; Senko v La Crosse Dredging Corp. 352 US 370, 1 L ed 2d 404, 77 S Ct 415) and under the Federal Employers' Liability Act (Tennant v. Peoria & P.U.R. Co. 321 US 29, 88 L ed 520, 64 S Ct 409, 15 NCCA NS 647; Ellis v Union P. R. Co. 329 US 649, 653, 91 L ed 572, 576, 67 S Ct 598; Dice v. Akron, C. & Y. R. Co. 342 US 359, 96 L ed 398, 72 S Ct 312; Rogers v Missouri Pacific R. Co. 352 US 500, 1 L ed 2d 493, 77 S Ct 443), trial by jury is part of the remedy. Thus the *provisions of the Seventh Amendment, noted above, are brought into play*. Schulz v Pennsylvania R. Co. supra (350 US at 524). As we recently stated in another diversity case, *it is the Seventh Amendment that fashions 'the federal policy favoring jury decisions of disputed fact questions.'* Byrd v. Blue Ridge Rural Electric Co-op., Inc. 356 US 525, 538, 539, 2 L ed 2d 953, 963, 78 S Ct 893. And see Herron v Southern P. Co. 283 US 91, 94, 95, 75 L ed 857, 860, 51 S Ct 383."

We therefore, respectfully submit that if the court assumes that petitioner is correct under the Texas decisions and that we are entitled to jury trial of fact issues under the Texas Law, that the Fifth Circuit failed to follow the law of Texas.

In the alternative, we submit that if the Fifth Circuit is right and had a right to construe the law of Texas in overruling the *Fox* case, that in any event in a diversity case the federal policy favors under the Seventh Amendment submission of these kind of matters to a jury for a fact determination and, hence, this Honorable Court on either theory should grant this Writ of Certiorari and affirm the Judgment of the trial court without further hearing or opinion as was done by this Court in the *Gibson* case, supra. We respectfully submit that the widow and her minor cildren are now entitled to the protection of the policy without further grievous delay.

Judge Noel, speaking for the Circuit Court of Appeals, clearly departed from the Texas rule as laid down by the Fifth Circuit in the case of *Carroll v. Magnolia Petroleum Company*, 223 F. 2d 657 (5th Circuit, 1955) and *Maryland Casualty Co. v. Broadway*, 110 F. 2d 357, (5th Circuit, 1940). Judge Noel not only did this but in effect, the Court as clearly shown by its opinion, attempted to overrule the *Fox* case, supra, 184 S.W. 2d 937, ref. w.m. without discussion of the opinion (exactly in point) by Chief Justice Calvert of the Texas Supreme Court in *Great American Reserve Insurance Co. v. Britton*, 406 S.W. 2d 901, decided July 27, 1966, rehearing denied November 2, 1966.

The Court of Appeals, in its attempt to distinguish the *Fox* case, supra, cited in a footnote that Fox was concerned with death caused by heat from the sun which is established

under Texas Law as an accidental bodily injury. In the body of the opinion, Judge Noel states as follows:

> "Now, is there a correlation between the bodily injury suffered by Kegley and cyanosis? The court in *Fox* concluded that sunstroke was the sole cause of death and, with this extremely important part of the puzzle solved, only had to determine if there was evidence on the exterior of the body which corresponded with the injury caused by the sunstroke."

The Court of Appeals apparently felt that the accident in this case was not an accidental injury and it can well be seen that this assumption is true when the court cites Dr. Prout in the footnote of the opinion to the effect that Dr. Prout said nothing of an accidental injury when the true facts were that at the time of Dr. Prout's brief examination following the death of decedent and at the time Dr. Prout wrote the death certificate, he did not know any facts concerning the history or work record of the deceased for a period of five days preceding his death, and in his brief opinion as to the cause of accident, the court ignored all of the 5 days of hard labor under exceptionally strenuous circumstances that Kegley was called upon to perform by his employer. This mistake probably stems from the fact that we had put two witnesses on hypothetically before we were able to procure from the respondent, under the direction of the trial judge, the work record of Kegley. It was then realized or should have been realized that Kegley unquestionably sustained an accidental injury. The decision of the Court of Appeals in *Maryland Casualty Company v. Broad-*

way, 110 F. 2d 357, clearly shows that this type of overexertion is an accidental injury in this language:

> *"But if the bodily injury is referable to a definite occurrence or series of occurrences in the work to which a time and place may be assigned*, it may be compensable though it does not result instantly."

The overexertion here was clearly limited to the five days preceding Kegley's death.

This case accords with the latest Texas case, *Consolidated Underwriters v. Wright*, 408 S.W. 2d 140, and hence, *there has been a clear departure in intimating that Kegley had not sustained an accidental injury in the effort of the Court of Appeals to distinguish the Fox case from the prior holdings of the Court of Appeals and the Texas Court on whether or not there was an accidental injury in this case.* We think as a matter of law the evidence shows without dispute that there was an accidental injury within the controlling rules stated in *Broadway* and *Wright*. supra. The *Fox* case following the leading case on this subject.

Which the Fifth Circuit, in its opinion, ignored said case being *Warbende v. Prudential Ins. Co. of America*, 97 F. 2d 749, quoted in American Jurisprudence as the leading case on this subject, 117 A.L.R. 760.

The Supreme Court of Texas in the *Fox case with great care points out that the Texas rule is different from that in other states.* We quote from the *Fox* case on page 942, as follows:

> "(7) Although there is a division of authority on the question in other jurisdictions, it is settled in Texas that a heat stroke may be a bodily injury within the meaning of a policy provisions like the one here in-

volved. Bryant v. Continental Casualty Co., 107 Tex. 582, 182 S.W. 673, L.R.A. 1916 E., 945, Ann. Cas. 1918 A 517; Metropolitan Life Ins. Co. v. Funderburk, Tex. Civ. App. 81 S.W. 2d 132, error dismissed; American Nat'l Ins. Co. v. Bennie, Tex. Civ. App., 106 S.W. 2d 336, error refused. In the last cited case the court quotes with approval the following statement taken from the annotation in A.L.R. 1197:

> 'It is held by the weight of authority, and apparently the better reasoned cases, that a sunstroke by one unexpectedly, is within the protection of an accident policy insuring against bodily injuries sustained through external, violent, and accidental means.'

"The reason announced by all the courts who adopt this view is *that a sunstroke, although it may be regarded as a disease by medical science, is generally regarded as an accident by the average layman who purchases accident insurance.* The question is discussed at great length in the Bryant case, supra, and for another comprehensive discussion of the leading cases see Richards v. Standard Acc. Ins. Co., 58 Utah 622, 200 P. 1017, 17 A.L.R. 1183. Appellant cites the opinion of the United States Supreme Court in Landress v. Phoenix Mut. Life Ins. Co., 291 U.S. 491, 54 S. Ct. 491, 78 L. Ed. 934, 90 A.L.R. 1382, but our Texas courts have adopted the view expressed in the dissenting opinion of Mr. Justice Cardozo. See American Nat. Ins. Co. v. Bennie, supra."

The Court of Appeals in reaching the decision that as a matter of law Kegley did not have an accidental injury and that cyanosis as a matter of law could not be a visible contusion or wound on the exterior of the body relied upon *Massachusetts Mutual Life Ins. Co. v. Pistolesi,* 160 F. 2d 668, and *Paul Revere Life Insurance Company v. Stanfield,* 151 F. 2d 776. In these cases *there was no medical evidence*

showing whether the cyanosis was a visible contusion or wound on the exterior of the body and hence the Court of Appeals was allowed to make its own medical findings based upon the dictionary.

We ask this Court to consider the hypothetical question heretofore set out in this Petition, propounded to Dr. Homan and the answers of Dr. Homan thereto (R. 351-356, reasked after objection to the question, R. 375-376, as follows (R. 376-381), (these questions and the answers thereto are of such controlling importance that we deem a question and answer quotation necessary).

> "Q. Oh, yes, one other thing, and that instead of saying that everybody saw the blueness of the lips, I just (363) want you to assume that Mr. Smoot did, Mr. Winkler did, members of the crew, and Mr. Miller, the ambulance driver, did; and then assuming everything else with those amendments to be true and correct, can you form an opinion as to the probable cause of his death?
>
> "A. Yes, sir.
>
> "Q. What is that opinion, Doctor?
>
> "A. I think he died of a myocardial infarction or coronary occlusion due to overwork, sustained overwork during a period of time.
>
> "Q. Doctor, I want to ask you, have you, during the forty-one years that you have treated people for heart trouble and heart disease and heart injuries, have you on many occasions, after they have died and an autopsy has been performed, in the sense of self education and to confirm what you have thought about them, been present and observed autopsies, many, perhaps thousands of times?
>
> "A. Well, hundreds of times I would say, yes, sir.

"Q. And, Doctor, assuming that the only doctor that ever did get to examine this man, Dr. Prout, said that he had a normal heart and a normal blood pressure, and assuming that he was a powerfully built man and was able to work long hours and still bowl at night, of course, I don't imagine he was doing very much bowling (364) when this was going on (indicating)—

"The Court:

"Mr. Watts, just ask the questions, please, with no sidebar comments.

"Q. All right, but assume that he was able to do all of those things side by side with his doctor, and that to his doctor he appeared to have recovered from his influenza, in fact, it wasn't serious enough to keep him from doing all of this eight to ten hours of this kind of daily work, the influenza, now, Doctor, is it possible, in your opinion, from your forty-one years of experience, not to mention the many years of study that you have made in specializing in diseases and injuries of the heart, for a man to have an injury due to this kind of activity and still have a normal heart at forty years of age?

"Mr. Gilliland:

"Now, Your Honor, at this time I want to interpose the same objection to that question that Mr. Watts interposed to the question that I propounded to Dr. McDaniel, and that is that all of the facts and circumstances of the case are not in evidence.

"Mr. Watts:

"Well, we at least put a few of (365) them in evidence he didn't put hardly any of them in evidence when he was delivering that lecture.

"The Court:

"Well, let me see if I have your question right, are you repeating the entire hypothetical question?

"Mr. Watts:

"Yes, sir.

"The Court:

"And exactly what are you asking?

"Questions by Mr. Watts:
(Cont'd.)

"Q. All right, is it possible, assuming all of the facts in the hypothetical question to be true, for a man to have a normal heart, this man, and still have a coronary occlusion from these kind of work conditions that we have enumerated?

"Mr. Gilliland:

"Now, Your Honor, which hypothetical question is he speaking of?

"The Court:

"I sustain the objection until you identify whether it is the original here as amended.

"Mr. Watts:

"The one as amended.

"The Court:

"Or the very last one, the short one that you gave.

"Mr. Watts:

"Well, I think either one of them is proper.

(366) "The Court:

"Well, I think they are not sufficiently definite for the Court to understand which one you have reference to or what you are limiting the facts to, and I am going to ask you to re word your question to make it clear.

"Mr. Watts:

"I will re-word it, but may I call the attention of the Court that over our protest this witness that he put on said that a man with a normal heart couldn't suf-

fer a coronary thrombosis and I would like to impeach that testimony.

"The Court:

"All right, well, frame your questions accordingly.

"Questions by Mr. Watts:
(Cont'd.)

"Q. All right, is it possible for a man forty years of age with a normal heart, under the conditions set forth in my first amended hypothetical question, to sustain a heart attack?

"A. Yes, sir.

"Q. How is it possible for a man with a normal heart to have it caused by over-exertion and strain such as we have detailed this man underwent for a few days before his injury, Doctor?

"A. Well, we know that the heart is a muscle, a big muscle, a muscular pump, and the heart muscle itself (367) must be supplied with blood vessels to sustain it. We also know that those blood vessels, the coronary arteries, are made up of three layers, the outer layer, or the adventitia, we call it, the middle layer, or the muscular coat, and the innter layer, or the intima, as we call it, which is very thin. The muscular coat and the other two all must be supplied by blood. The muscular coat is generally supplied with little arteries that are called end arteries, and under sustained exertion sometimes one of those little arteries will rupture and start leaking blood. Well, when it does, there is only one way for it to go, and that is the line of least resistance is to the inner surface, that is the channel the blood is going through in the coronary artery, and that might vary, it might happen quickly, or it might take, according to the size of the little vessel that was ruptured, might take a good while, but gradually it will occlude that coronary artery, that branch where the injury is sustained, and that can happen in a normal heart.

"Q. Yes, sir, in other words, the attack doesn't always immediately follow the straining?

"A. That is correct.

"Q. Now, Doctor, assuming the facts that I have set forth (382) in my amended hypothetical question, the first amended one, in the few little respects that it was amended, to be true and correct, would you say that the heart attack that this man suffered was caused solely by the sustained over-exertion that he went through during that period of time preceding his injury entirely exclusive of and independently of any disease and any other condition of the heart?

"A. Assuming that he had a normal heart?

"Q. Yes, sir.

"A. Yes, sir, there is no doubt but what he had a coronary occlusion, a myocardial infarction, and if he had a normal heart, and we assume that, I would think that it would be caused by just this thing that I have just enumerated.

"Q. Solely caused by that?

"A. Yes, sir.

"Q. All right. Now, Doctor, is this purple discoloration that he had there immediately after this attack, is that outward visible external evidence of an internal damage or injury to the body, in this case the heart?

"A. I would judge so, a collapse of circulation due to injury to the heart."

By ignoring this evidence and making these determinations the Court of Appeals has denied the right of trial by jury guaranteed by the Seventh Amendment to the Constitution of the United States, to June Kegley.

The Court of Appeals in making the decision has likewise ignored not only the *Fox* case and the cases upon which Fox

relies, but the Court of Appeals ignored the testimony of Dr. Homan, an outstanding cardiologist from El Paso, Texas as is set out in the Statement of Appellee's Brief in Support of Motion for Rehearing to which we refer this Honorable Court without the necessity of lengthening this Petition since the evidence covers several pages which has been ignored and disregarded.

Of course, it is a fundamental principle of law that in passing upon the question of sufficiency of evidence all inferences are to be indulged in favor of the evidence actually offered, but the Court of Appeals has violated this well established principle and has undertaken to set itself up as a medical investigative body as shown by the opinion in this cause. Under Supreme Court of Texas decisions hereinabove exercised Court of Appeals was bound as a matter of law to follow, and hence certiorari should be granted.

It is necessary to quote at great length from the *Britton* case which is self-explanatory, beginning on page 904, as follows: to determine this important question of whether fact issues exist as to whether Kegley died of disease or of an accidental injury as required by the terms of the insurance policy.

> "There is considerable lay testimony in the record indicating that the insured appeared to be in good health when the policy was delivered. The evidence is set out in detail in the opinion of the Court of Civil Appeals. We need not notice this testimony further as it does not control decision of the issue as we have stated it.
>
> "The evidence which Great American asserts establishes as a matter of law that Britton was not in good health consists of the deposition testimony of Dr. John

G. Bagwell; a hospital record of a medical history and diagnosis made by Dr. C. D. McMillan; testimony of Dr. Lester Hodges, Britton's family physician; and Britton's death certificate.

"Dr. Bagwell examined Britton on May 1, 1959, some two years and four months before the policy was delivered. Britton went to see Dr. Bagwell because he was having a tremendous amount of gas pressure and pains in his chest. In May, 1962, Dr. Hodges recommended that Britton see Dr. McMillan because 'he was having difficulty with his stomach, and he was burning and (had) symptoms of an ulcer.' Britton was hospitalized by Dr. McMillan from May 15 to May 18, 1962, three years after the examination by Dr. Bagwell and some eight months after the insurance policy was delivered.

"Britton gave both doctors a history of chest pain which radiated into his arms. Dr. Bagwell was convinced by the history given him, a physical examination which was 'considered to not show any definite abnormality,' x-rays which were 'considered to be normal,' and an electrocardiogram showing features 'considered to be probably abnormal' that Britton had 'heart trouble' which he diagnosed as 'angina pectoris, probably due to arteriosclerosis', and for which he prescribed nitroglycerin tablets for relief of pain. Dr. McMillan concluded from the history given him, a physical examination which 'failed to disclose any significant abnormality,' and tests which revealed 'changes consistent with left ventricular hypertrophy' and 'positive changes indicative of coronary sclerosis' that Britton had a duodenal ulcer of recent origin, chronic gastritis and 'coronary insufficiency.'

"Britton was found dead in his bed in the morning of February 6, 1963. The death certificate, signed by Dr. Hodges, gave the immediate cause of death as 'myocardial infarction.'

"Great American does not contend that Britton had the duodenal ulcer, found by Dr. McMillan, when the

policy was delivered, or that chronic gastritis would void the policy. We narrow our attention, therefore, to the evidence relating to Britton's heart condition.

"(2, 4) An insurance policy requirement that an applicant for insurance be in 'good health' does not mean 'perfect health.' If it did, all policies could be canceled within the contestable period. It is for this reason that the courts have evolved certain standards for measuring 'good health'. The term is usually defined as a state of health free from any disease or bodily infirmity of a substantial nature which affects the general soundness and healthfulness of the system seriously or materially increases the risk to be assumed by the insurer. See Sovereign Camp, W.O.W. v. Derrick, Tex. Civ. App., 64 S.W. 2d 982, 983 (1933) writ refused; Vann v. National Life & Accident Ins. Co., Tex. Com. App. 24 S.W. 2d 347, 349 (1930); Southern Surety Co. v. Benton, Tex. Com. App. 280 S.W. 551 (1926); Hines v. Kansas City Life Ins. Co., Tex. Civ. App. 260 S.W. 688, 690 (1924), writ dism; National Life & Accident Co. v. Moses, Tex. Civ. App., 257 S.W. 289 (1923), no writ hist.; Couch on Insurance, sec. 885 a. We have also held that a good health provision is breached if the applicant 'is suffering from a serious kind of illness, which continues and eventually causes his death.' Texas Prudential Ins. Co. v. Dillard, 158 Tex. 15, 307 S.W. 2d 242, 247 (1957). The conclusiveness of Great American's proof that Britton was not in good health must be tested by these Standards.

"(5) Although Dr. Bagwell's testimony is highly equivocal at best, for opinion purposes we may treat the testimony as establishing conclusively that Britton had 'heart trouble', which Dr. Bagwell diagnosed as 'angina pectoris' but which Dr. McMillan diagnosed as 'coronary insufficient'. We are next met with this question: How seriously did the 'heart trouble', 'angina pectoris', or 'coronary insufficient' affect the general soundness and healthfulness of Britton's system generally, and

how materially did they increase the risk of Great American? These are matters about which expert medical witnesses would be competent to testify, but the only competent evidence having any bearing on the question which we may consider is testimony of Dr. Hodges that angina 'is a continuing type of disease'. The result is that to hold the good health provision of the policy was breached as a matter of law we would have to take judicial notice that the nature of one or more of the ailments was such as to seriously affect the soundness of Britton's health or to materially increase Great American's risk. These are relative matters, and except in extreme cases should be left for jury determination from evidence introduced on trial.

"(6) 'Heart trouble' is a broad term and no doubt encompasses more than one type of specific ailment. 'Angina pectoris' is defined by Webster's Third New International Dictionary as 'a disease characterized by paroxysmal attacks of substernal pain of short duration that is usually associated with a sense of apprehension or fear of impending death, precipitated by effort or emotion, and relieved quickly by rest or administration of nitroglycerin.' Although angina may be, as Dr. Hodges testified, a continuing disease, the evidence does not tell us whether during its continuance it has a progressively more serious effect on health or the rapidity of its progression. In American Casualty & Life Co. v. Gueringer, Tex. Civ. App., 205 S.W. 2d 423, 424 (1947), no writ hist., the court noted that the 'details of the nature and progress of the disease of cancer are not subjects of either common or judicial knowledge.' Neither may we know the details of the nature and progress of angina pectoris from common or judicial knowledge. In this connection, it is to be noted that Dr. McMillan's final diagnosis, made three years after diagnosis by Dr. Bagwell and eight months after delivery of the policy, was 'coronary insufficiency.' Webster's, supra, defines 'coronary insufficiency' as 'coronary insufficiency of relatively mild degree.'

"(7) In Dillard, supra, the evidence was conclusive that the applicant had epilepsy in its most serious form when the policy was delivered, and that the affliction was the cause of death. On that proof was concluded that the insurer had established breach of a good health provision as a matter of law. Dillard does not rule this case. As pointed out, the evidence here does not conclusively establish a serious infirmity when the policy was delivered. Moreover, death from angina pectoris is not conclusively established. Webster's, supra, defines 'myocardial infarction' as 'infarction of the myocardium, typically resulting from coronary occlusion,' and defines 'coronary occlusion' as 'the partial or complete blocking of a coronary artery (as by a thrombus by spasm or sclerosis of the artery).' We may believe or strongly suspect that Britton's death from a myocardial infraction was caused by sclerosis of an antery rather than by a thrombus, but we do not know it and no evidence was offered to prove it. We hold that the evidence does not establish conclusively, according to legal standards that Britton was not in good health when the policy was delivered. Great American's motion for instructed verdict was properly overruled.

"The principal cases cited by Great American for a contrary conclusion are Dillard, supra; Lincoln Income Life Ins. Co. v. Mayberry, 162 Tex. 492, 347 S.W. 2d 598 (1961) and Great National Life Ins. Co. v. Hulme, 134 Tex. 539, 136 S.W. 2d 602, (1940). We have dealt with Dillard. In Mayberry the insured child died within two days of delivery of the policy, and the medical evidence was that at the time of delivery thereof the physical condition of the child was such that it had only a fifty-fifty chance of survival. There is no such evidence in this case. In Hulme there were jury findings supporting the conclusion that the insured was not in good health. See opinion of Court of Civil Appeals, 116 S.W. 2d 459, 460 (1938).

> *"Voiding insurance policies on judicial knowledge of the 'substantial' character of certain diseases and their 'serious' effect on health is a dangerous encroachment into an area of expert medical opinion.* It is safer to require proof; and proof at the trial court level may well settle the issue."

The Circuit Court of Appeals likewise departed from a well established rule of the Texas Courts in stating that cyanosis could not represent in this case a visible contusion or wound on the exterior of the body by relying upon the testimony of the defendant's doctor, Dr. McDaniel. Dr. McDaniel's testimony was stricken by the trial Court upon the grounds *it assumed facts not in evidence and correctly did so under the decision of the Court of Appeals in Carroll v. Magnolia Petroleum Company, 233 F. 2d 657.* In that case the Court of Appeals went to great lengths to point out that where an expert witness such as Dr. McDaniel had no knowledge of the specific case being tried, that a hypothetical question may be used in assuming facts, but care must be exercised to *assure that the facts stated in such question are supported by competent evidence in the record so as to prevent witnesses from invading or usurping the province of the jury and the issues to be decided.* We refer this Honorable Court to this decision so as to show.

The unquestioned error of the Court of Appeals in relying upon a witness whose *evidence was not competent in reaching its conclusion.* The entire opinion is worthy of reading. For the sake of brevity, we quote from the opinion on page 664, highlighting pertinent facts which are self-explanatory. This case clearly shows that the Court of Appeals by its opinion in this case has invaded the province of the jury

under the Seventh Amendment of the Constitution of the United States. The Fifth Circuit said this:

> "(1, 2) A properly qualified witness, whose training or experience, or both, has given him peculiar and reliable knowledge of the subject being explored, may give his opinion thereon to assist the trier of facts in handling specialized fields. However, it is always necessary to lay a proper foundation for such opinion evidenced by correlating the testimony with the facts of the particular case being tried. If the expert has no knowledge of these specific facts, the 'hypothetical question' may be used. Even then, care must be exercised to assure that the facts contained in the hypothetical question are supported by competent evidence in the record. It must always be remembered that the jury in sitting to hear and decide the facts, and in a case like this one, to determine the real cause of the accident. There is ever present danger that an expert witness may invade, indeed, usurp the jury's province by giving an opinion upon the ultimate issue to be decided; and only meticulous supervision by the trial judge can avoid such consequences.
>
> "(3-5) Applying these general remarks to the present case, we think it was entirely proper to allow experienced drillers and rig builders to explain in general terms the proper procedures for operating a drilling rig and for constructing an oil derrick, since it was certainly necessary for the jury to know something about these subjects in order to decide the case. However, we believe the record, as illustrated by the colloquy quoted in the footnote, clearly reveals that counsel for all parties and the trial court failed to bear in mind the true purpose and scope of expert testimony. Only one of the witnesses from whom such testimony was elicited was present when the accident occurred, and the judge quite properly refused to allow him to state whether he saw appellant do anything which in his opinion was a cause of the accident.

> Yet, Johnson was allowed to speculate as to the cause, and appellees' witnesses not only stated their opinions as to the cause but actually testified in detail what they thought appellant did to bring about the collapse of the derrick. Appellee's whole defense was predicated upon and built up around their expert testimony as to the cause, and their witnesses repeatedly referred to the velocity of the wind and the excessive swinging of the crown block in stating their opinions, although the only two witnesses on the scene swore the block was not swinging. A mere reading of their testimony illustrates clear examples of experts invading the province of the jury, and the error was compounded when they were allowed to assume facts not proven."

The Court of Appeals even attached significance to the fact that Dr. Prout did not mention any condition contributing to his death or described how the injury occurred in the death certificate as a matter of significance in this case, when Dr. Prout had no earthly knowledge as to the character of work that Kegley had been doing as described in the hypothetical question and hence, could not pass upon the question. *Dr. Prout, when presented with the facts, that is even a small portion of the facts, considered the death to be caused by accident and overexertion.* One would think from reading the opinion of the Court of Appeals in this case in a number of respects that the Court of Appeals had become carried away with the justness of the defendant's position as the opinion is so full of violations of precedents of the Supreme Court of Texas and the Court of Appeals.

There is nothing in the later case of *Mutual Benefit Health & Accident Ass'n v. Hudman*, 398 S.W. 2d 110, that

has served to overrule the *Fox* case as suggested by the Court of Appeals. It is true that that case limited coverage to death from accidental injury independent from other causes. The Court of Appeals in the *Hudman* case said as follows, and bear in mind that in the *Hudman* case, Justice Greenhill pointed out on page 115 of the opinion that the insurance coverage in that case covered *accidental bodily injuries received while you are driving or riding in a car. The overexertion Judge Greenhill stated, in which the insured engaged took place on the farm outside of the automobile, and that for these reasons the Court of Appeals correctly denied recovery on the policy.* However, the Supreme Court in the *Hudman* case recognized the rule that it required *the competent evidence of qualified persons to separate the real cause of death from mere conditions or at least raise issues for determination by the fact finder.* Likewise, in that case all of the medical experts agreed that the accidental injury concurred with a pre-existing disease to cause the death. The Supreme Court of Texas stated in Hudman supra:

> "The rule is cogently summarized in 1A Appleman, Insurance Law and Practice, §403:
>
> > 'As a general rule, it has been stated that if there is a pre-existing disorder or illness at the time an injury is received, recovery may still be had if the injury was severe enough to have caused the entire damage or considerable damage, but not if the disease was the proximate cause or principal cause thereof. From this, it has been held that where a disease condition aggravates the result of the injury or is, itself, aggravated thereby, there can be no recovery, where the combined result is to cause the death or disability. This has been

particularly supported where the death or disability would not have resulted from the external injury alone, but, with the combination of injury and disease, the loss is produced. * * *'

"(5) The result we reach in this case is compelled by the terms of the policy *and the evidence of all the physicians.* We do not hold that every pre-existing frailty or enfeeblement of the human body which coexists with an accidental injury will defeat recovery under such policies as Hudman's. To do so would defeat recovery in most instances because mere senescence makes all flesh heir to infirmity and weakness. Policies are, to use Cardozo's phrase, issued to those who are neither 'an Apollo or Hercules.' Silverstein v. Metropolitan Life Ins. Co., 254 N.Y. 81, 171 N.E. 914 (1930). Recovery is not defeated when a pre-existing condition or disorder is so remote in the scale of causation, so dormant and insubstantial, or so temporary and transient that it does not materially contribute to the death or injury. Howe v. National Life Ins. Co., 321 Mass. 283, 72 N.E. 2d 425, 170 A.L.R. 1254 (1947). In most cases the competent evidence of qualified persons separates the real causes of death or injury from mere conditions or at least raises issues for the determination by the fact finder. 29 Am. Jur. Insurance, §1211-1213; 82 A.L.R. 2d 614, 623; 56 A.L.R. 2d 806-808; 131 A.L.R. 266-269, 1 A Appleman, Insurance Law & Practice, §403, p. 88. *This is not our case. All the medical experts agreed that the accidental injury concurred with a pre-existing serious disease to cause the death.*"

The *Hudman* case is clearly in point with our position *that where there is competent medical evidence it is sufficient to raise issues of fact for the jury.* In this the Kegley case the medical experts disagreed. Hence a clear distinction exists here in favor of petitioners right of recovery under the policy.

If, under the evidence in the *Britton* case, where the man was taking nitroglycerin tablets for a heart condition, it can be said by the Supreme Court of Texas that he was in good health and that that condition *did not materially contribute to his death, then certainly the same can be said with greater force in the case at bar.*

It is likewise evident that there has been a clear departure as laid down by many decisions of the Court of Appeals and the Texas Courts that the policy is to be construed against the insurer who drew it and that *the policy would have to be construed in the light of Texas law with reference to the meaning of accidental injury.*

Petitioner cited to the Circuit Court of Appeals in addition on Motion for Rehearing, new cases involving blueness of the lips as an indication of bodily injury, in addition to the one which Judge Noel, in his opinion, has attempted to distinguish. It is quite evident that this decision is such a departure from well settled principles of law and particularly from the law of Texas, and represents such an injustice to the widow and children that under *Erie* and cases of like import, certiorari should be granted by this Court.

WHEREFORE, your Petitioner respectfully prays this Honorable Court to grant the Petition for Writ of Certiorari to the end that on review the Circuit Court may be directed to reverse its judgment and that this Court should affirm the

Judgment of the United States District Court in and for the Western District of Texas, Pecos Division.

Respectfully submitted,

JOHN J. WATTS,
P. O. Box 1031,
Odessa, Texas,

and

JOHN G. PATTERSONN,
711 Fannin Street,
Houston, Texas,

By John G. Patterson
Attorneys for Petitioner,

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing Petition for Certiorari has been furnished counsel for Respondent, Mr. Elton Gilliland and Mr. James O'Leary, P. O. Box 1552, Odessa, Texas, by placing the same in the United States Mail, postage paid, Certified Mail, Return Receipt Requested, on this 19 day of Dec., A.D., 1967.

John G. Patterson

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 23437

AETNA LIFE INSURANCE COMPANY,

Appellant,

versus

JUNE KEGLEY, a Widow,

Appellee.

Appeal from the United States District Court for the Western District of Texas.

(August 15, 1967.)

Before BELL and GODBOLD, Circuit Judges, and NOEL, District Judge.

NOEL, District Judge: This appeal is taken on the ground that the district court's instructions to the jury pertaining to sole cause of death and visible contusion or wound on the exterior of the body were not in conformity with the language of the accident insurance policy or with the Texas law. We agree. The judgment of the district court is reversed, and the cause is remanded with directions to enter judgment for Aetna Life Insurance Company.

In 1961, Aetna Life Insurance Company issued a group accident policy to Halliburton Company for the benefit of the company employees. Joseph Felix Kegley, deceased husband of appellee, was an employee and entitled to coverage under this policy on the date of his death.

Kegley was forty years old, considered to be a good worker and appeared to be in good health immediately before his death. In his work for Halliburton, Kegley was described as a treater, a cementer, and a supervising foreman of the frac crews.

During the five-day period preceding death, Mr. Kegley was under some emotional strain and had been working between ten and nineteen hours a day. After sleeping about four hours, Kegley reported for work on the morning of December 30, 1961. He began the day by loading out a Halliburton truck, which included lifting a number of 100-pound sacks of chemicals and some pipe. Kegley drove the truck to a lease site. After arriving at the lease, he set up a frac-o-meter and pressure recorder (weighing 75-85 pounds and 45-50 pound, respectively). *This was work he normally, although intermittently, performed.* Kegley did not complain of any difficulties, *and nothing unusual was reported.*

When the employee of the lessee arrived, Kegley and another Halliburton employee walked over to meet him. After walking about fifty feet, Kegley grabbed onto a nearby truck and immediately fell to the ground, unconscious. He never regained consciousness. Several witnesses to the incident recalled that after he had collapsed, his lips turned a bluish color.

An ambulance took Kegley to the hospital, where he was pronounced dead upon arrival. The attending physician, Dr. Fred Prout, concluded that death was caused by a coronary thrombosis and recorded this conclusion on the death certificate.[1] No autopsy was performed.

June Kegley, the widow of deceased and plaintiff below, gave Aetna notice of the death, but Aetna has refused to recognize the death as one covered by the terms of the group policy.

Trial was to a jury, which returned a verdict for the widow, and judgment was entered accordingly.

The pertinent provisions of the policy read as follows:

> "If an employee suffers a bodily injury caused by an accident and as a direct result of such injury and, to the exclusion of all other causes . . . [sustains a covered loss, he may recover] . . . provided:
>
> . . . .
>
> "(b) the injury is evidenced by one or more visible contusions or wounds on the exterior of the body, except in the case of drowning; and
>
> "(c) the loss resulting from the injury is not excluded from coverage in accordance with Section 3 . . .
>
> . . . .
>
> "Section 3. Exclusions
>
> No insurance is provided and no benefits shall be payable . . . if the loss . . . is caused or contributed to

[1] Below the space designated immediate cause of death, which contains Dr. Prout's diagnosis "coronary thrombosis," the death certificate provided space to explain what the cause of death was "due to." This space was left blank.

The certificate of death also provided space to list "other significant conditions contributing to death but not related to the terminal disease condition," or to "describe how injury occurred." These spaces were not filled.

by, or is the consequence of, or is in any way attributable to, any of the following excluded risks, even though the proximate or precipitating cause of said loss or disability is a bodily injury caused by an accident.

"(a) bodily or mental infirmity; or

. . . .

"(c) disease of any kind, except a pyogenic infection attributable solely to and . . . the proximate result of an injury not excluded. . . ."

It is the contention of appellee that overexertion for four or five days preceding death caused a blood vessel to rupture, thereby releasing an abnormal amount of blood into a coronary artery, which caused the artery to become blocked or occluded, producing a coronary thrombosis. Appellee argues that this was a "bodily injury caused by an accident," and recovery can be had under the policy provisions. Appellee further argues that the blueness in the lips observed after Kegley's attack met the policy requirement that there be "one or more visible contusions or wounds on the exterior of the body."

It is the contention of Aetna that Kegley was suffering from atherosclerosis, a degenerative heart disease which results in the narrowing of blood vessels, and that the disease contributed to or caused an occlusion of the artery, a coronary thrombosis. Aetna further contends that blueness in the lips is not a visible contusion or wound on the exterior of the body.

At trial, a considerable amount of medical testimony was received. Plaintiff offered the testimony of Dr. Fred Prout, who had been Kegley's physician for a number of years.

He was the only medical witness who examined Kegley. Dr. Prout stated that Kegley had no prior history of heart trouble.

Dr. Prout had last examined Kegley in late September of 1961, after Kegley had suffered an attack of virus influenza. On making his diagnosis, Dr. Prout found Kegley to be suffering from some embarrassment of the heart muscles and the vessels surrounding the heart. Kegley's blood pressure, however, was normal. The doctor asked that Kegley return at a later date for a complete physical examination, but he did not do so.

Dr. Prout stated that he bowled with Kegley weekly and that this continued after the last examination; that Kegley never complained of any illness or pain; and that when last seen by the doctor, Kegley appeared to be in good health.

After hearing counsel for the appellee state a series of hypothetical facts corresponding to those surrounding the death of Kegley, Dr. Prout gave his opinion that the coronary thrombosis was caused by overexertion.

The same hypothetical facts were stated to two other medical experts called by the appellee. They, too, were of the opinion that overexertion, fatigue, and mental stress and strain caused a blood vessel to rupture, and that the resulting hemorrhage caused the coronary thrombosis. Assuming Kegley had a normal heart, the two doctors gave their opinions that overexertion could be the sole cause of the coronary thrombosis.

The appellant called one medical expert who was of the opinion that there could be no coronary thrombosis without preexisting disease (atherosclerotic coronary heart disease), and, therefore, Kegley could not have had a normal heart at the time of the attack leading to his death.

The district judge, over the objections of appellant, gave the jury the following instructions:

> Under the law of Texas, if said overexertion, overfatigue, physical and mental stress for the period of four to five days preceding the death . . . was a proximate cause of his death, by either causing the coronary thrombosis, or by aggravating the preexisting disease, if any, . . . under the law a bodily injury[2] occurring under such circumstances would be one to the exclusion of all other causes. [Plaintiff may recover] as long as you believe that such overfatigue, overexertion, mental stress or worry, or loss of sleep and rest . . . prior to the death . . . was a proximate or efficient cause of his death . . . even though disease may have been a secondary cause thereof.
>
> By the term "Proximate Cause" as herein used, means the moving and efficient cause, without which the injury in question would not have happened.
>
> In this case the Defendant has also contended by testimony which it has offered in this case that blueness of the lips would not be an injury that is evidenced by one or more contusions or wounds on the exterior of the body. In this connection, you will not be controlled by the medical or commonly understood definitions of "visible contusions" or "wounds" but you are further instructed that if you believe from a preponderance of the evidence that the accidental bodily injury, if any, . . . caused the blueness around the lips

[2] The court defined bodily injury to include "the incitement, acceleration or aggravation of any disease . . . ."

> of the said Joseph Felix Kegley following said bodily injuries, and if you further find from a preponderance of the evidence that the said blueness of the lips were visible marks that were the result of the bodily injury, if any, then you are instructed that as a matter of law, the Plaintiff has met the requirement of the policy requiring an injury that is evidenced by one or more visible contusions or wounds on the exterior of the body. . . .

In framing its instruction on the correlation between accident and disease as the cause of Kegley's death, the district court appears to have relied upon *Mutual Benefit Health and Accident Ass'n v. Hudman*, 385 S.W. 2d 509 (Tex. Civ. App. 1964).

Subsequent to the trial of the case at hand, however. *Hudman* was reversed by the Supreme Court of Texas. *Mutual Benefit Health and Accident Ass'n v. Hudman*, 398 S.W. 2d 110 (Tex. 1965).[3] In holding the trial court in error, the court said that accidental injury "independent of other causes," means that the accidental bodily injuries must be the sole cause of death, and that death is not caused solely by accidental bodily injury if *disease* contributes to, concurs in, or aggravates the cause of death, excepting the situation where the disease or disorder is so remote or dormant that it does not materially contribute

[3] The *Hudman* case involved facts unfamiliar to this case, and the insurance policy covered injuries received only while driving an automobile; but that policy, as the policy here issued by appellant Aetna, limited coverage to death from accidental injury independent of other causes. The principles to which the Texas court directed itself are equally applicable here.

to the death or injury.[4] The Court in *Hudman* said that the beneficiary had the burden of proving that the insured's death resulted solely from an accidental injury (overexertion). 398 S.W. 2d at 113-14, 115.[5]

The Aetna policy, as contrasted with the policy before the Texas Supreme Court in *Hudman*, represents an attempt to place a heavier burden upon the beneficiary by providing that recovery is precluded if death was contributed to, a consequence of, or in any way attributable to bodily or mental infirmity or disease, even though the proximate or precipitating cause is a bodily injury caused by an accident. Of course, such a burden is limited by public policy, and, as the Court in *Hudman* recognized, recovery is not defeated when the preexisting disease is a remote cause of death. The insured is not expected to be an Apollo or Hercules.[6]

---

[4] With reference to remoteness, see 2 Richards, Insurance §218, at 744 (1952).

[5] The burden is displaced by proving by a preponderance of the evidence that the insured's death comes within the terms of the policy; *i.e.*, that death was the direct result of a bodily injury caused by an accident and that death was not contributed to by preexisting bodily infirmity or disease. See Republic Nat'l Life Ins. Co. v. Bullard, 399 S.W. 2d 376, 380 (Tex. Civ. App. 1966), *writ ref. n.r.e.*; 22 Appleman, Insurance Law and Practice §§13401-04, 21 Appleman §§12171, 12141; 10 Couch, Insurance §41: 380, at 349 (1962); McNiece, Heart Disease and the Law 102 (1961).

As to the public policy limitation, see Aetna Life Ins. Co. v. Young, 113 F. 2d 601, 602 (5th Cir. 1940).

[6] For years, insurance companies have labored to devise a clause for use in accident benefit policies (and double-indemnity accidental death life policies) which would preclude recovery when death would not have resulted from the accidental bodily injury had there been no preexisting disease. See Bronson and Fields, *The Problem of Concurrent Causation of Death Under Health and Accident Policies*, 1965 Ins. Counsel J. 241.

When, as in this case, cause of death is a matter of dispute among medical experts, the jury must draw their own conclusion as to the cause of death. The court's instructions supply the jury with a formula which should enable them to draw a conclusion in accord with the law and facts of the case, presumptions, and burdens of proof. But, from the instructions given by the court below, the jury could have concluded that Kegley's death came within the terms of the policy, even though they believed a preexisting disease was a contributing or secondary cause. Such a conclusion would be in conflict with the law in Texas, as pronounced by *Hudman*, and the language of the policy. Specifically, the jury was not asked to determine if preexisting disease was a proximate, joint, contributing or concurrent cause of death.[7] Consequently, the precise burden of proof required by applicable Texas law was not placed upon appellee. This constituted reversible error.

In response to *Hudman*, appellee argues that secondary cause (as the district court instructed) and remote cause (as approved by *Hudman*) are synonymous. But "remote" is further removed from the cause than "secondary," and

[7] See combined American Ins. Co. v. Tunnell, 311 S.W. 2d 76, 77 (Tex. Civ. App. 1958).

It would appear that it was also error to instruct the jury that appellee could recover if mental stress was found to be a contributing cause. In Pan American Life Ins. Co. v. Andrews, 340 S.W. 2d 787, 792 (Tex. 1960), the Texas Supreme Court denied recovery under a similar policy provision where it was argued that psychic trauma was the cause of death, and said, "We can see no distinction between the case at bar and a fatal attack of heart failure suffered by an insured induced by the excitement of watching a football game or a television program, or in fact, worry brought about by financial or domestic problems if the mental disturbance is said to have caused a thrombosis which in turn caused the death." While the court was not there concerned with overexertion, the principles are identical.

they are not generally recognized as being synonymous. Webster, New International Dictionary (3d ed. 1961); Roget, Thesaurus (3d ed. 1962).[8]

It was also error for the district court to define proximate cause as "the moving and efficient cause, without which the injury in question would not have happened." In *Hudman*, the court specifically disapproved of the "but-for" test, *i.e.*, that the death would not have resulted but for the accidental injury. 398 S.W. 2d at 113.

In the second instruction complained of by the appellant, the trial court instructed the jury that if they believed an accidental bodily injury caused the blueness around the lips of Kegley, and if they found the blueness of the lips to be a visible mark that was the result of the bodily injury, as a matter of law this blueness was a visible contusion or wound on the exterior of the body.

This court also regards the determination of whether blueness of the lips is a visible contusion or wound to be a question of law, not of fact.

In support of the instruction given by the trial court appellee cites *Pledger v. Business Men's Accident Ass'n of Texas*, 228 S.W. 110 (Tex. Comm. App. 1921), and *Royal Casualty Co. v. Nelson*, 153 S.W. 674 (Tex. Civ. App. 1913).

[8] A secondary cause would be associated with the principal cause, although a secondary, alternative, or substitute cause. See Roget, Thesaurus §148.8. A remote cause is separate and apart from the principal cause, and removed therefrom. *Ibid.* §198.8.

Both of these cases construed policies requiring visible marks as evidence of the accidental injury to the body.[9]

While the trial court treated the Aetna policy as one requiring only a visible mark produced by a bodily injury, a policy which requires evidence of a visible mark or other evidence of injury on the exterior of the body is very different from one which requires a visible contusion or wound on the exterior of the body, the latter being more restrictive. A visible contusion or wound is a special kind of mark or sign upon the exterior of the body. 10 Couch, Insurance §41: 779, at 621 (1962). As a Texas court said in *Royal Casualty Co. v. Nelson*, 153 S.W. at 676: "The 'visible mark upon the body' required by the policy need not be a bruise, contusion, laceration, or broken limb, but may be any visible evidence of an internal injury. It need not be upon the surface of the body, but might be any physical effect observable from an outward indication. . . ."

A contusion is defined as an injury to a person which affects subcutaneous tissues without breaking the skin, and is synonymous with bruise; a wound is described as an injury which causes the skin or other membrane to be broken. *Zorn v. Aetna Life Ins. Co.*, 260 F. Supp. 730, 733 (E.D.

[9] Appellee also cites Barry v. United States Mutual Accident Ass'n. 23 F. 712 (Cir. Ct. E.D. Wis. 1885), United States Mutual Accident Ass'n. v. Barry, 131 U.S. 100 (1889). The policy in *Barry* required an external and visible sign of injury. Appellee cites Hann v. Life & Casualty Ins. Co. of Texas, 312 S.W. 20, 261 (Tex. Civ. App. 1958). The Court in *Hann* said it may have been error to instruct the jury as the district court did in our case, but did not decide the issue because the point had not been properly raised.

So far as this court can discern from the opinions of the cases cited by appellee, none of the cases involved blueness of the lips, at least not as the sole indication of bodily injury.

Tex. 1965); 10 Couch, Insurance §41: 778, at 620 (1962). The testimony of all the medical witnesses was in accord with these accepted definitions.

Nonetheless, in *American Nat'l Ins. Co. v. Fox*, 184 S.W. 2d 937, 943 (Tex. Civ. App. 1944), *writ ref. w.m.*, the court stated, as did the trial judge in this case, that the courts are not bound by the technical definitions of wound and contusion: "The kind of 'contusion' or 'wound' which the body must show in a heat stroke case naturally must be the kind of external evidence that would be produced by a heat stroke," i.e., the kind of contusion or wound which corresponds with the nature of the bodily injury suffered. If *Fox* applies to this case, in the absence of convincing evidence that the Texas Supreme Court would decide differently, this court is *Erie* bound to follow the *Fox* rationale. *Stoner v. New York Life Ins. Co.*, 311 U.S. 464, 467 (1940); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

Is blueness of the lips a visible contusion or wound which corresponds with a ruptured blood vessel and a coronary thrombosis? Before attempting to resolve the question, it will be helpful to gain some insight into the causes of blueness of the lips, medically denominated "cyanosis."[10] Because this is a question of law, rather than relying exclusively upon the testimony of the medical experts who testified at the trial, the court has consulted medical authority for assistance in achieving a more complete understanding of the medical terminology.

[10] During the trial, the medical witnesses identified the blueness which was observed in Joseph Kegley's lips as cyanosis.

Cyanosis is described as a "bluish or purplish coloration of the skin and mucous membrane due to deficient oxygenation of the blood in the lungs or to an abnormally great reduction of the blood in its passage through the capillaries." Stedman, Medical Dictionary (17th ed. 1949). Or put another way, cyanosis is a change in the color of the blood caused by the presence of venous blood in dilated superficial blood vessels, in which an abnormally high percentage of the hemoglobin has lost its oxygen. The cyanosis is made visible by the dilation of the blood vessels of the skin and mucous membrane and is frequently seen in the lips, where the blood vessels are numerous and most exposed to the surface. White, Heart Disease 58 (1956). This is essentially the definition of cyanosis given by the medical experts during the trial of this case.

There are several causes for a deficiency of oxygen in the blood: (1) slowing of the peripheral circulation by cold or vasomotor nervous stimulation, (2) obstruction to the return of blood to the heart, (3) congestion of the lungs due to heart trouble, (4) certain congenital heart defects, (5) disease of the lungs, (6) tracheal or bronchial obstruction, and (7) high altitudes. White, Heart Disease 58-60 (1956). Cyanosis is a prominent feature of many forms of heart disease. III The Cyclopedia of Medicine 195 (1966).

When a person suffers a coronary thrombosis, there is a partial or complete obstruction of a blood vessel by a clot formed within the space of the vessel tube. If the blockage or occlusion is severe, the flow of the blood to a part of the heart is seriously reduced, and, as a consequence, the

supply of oxygen in the blood is reduced. When this occurs, visible cyanosis normally follows.[11] Especially is this true if the blood supply to a part of the heart is so impaired as to cause a myocardial infarction, *i.e.*, death of a portion of the heart muscle. 8 Traumatic Medicine and Surgery for the Attorney 300. 757 (1962); White, Heart Disease 517-66 (1956).

A coronary thrombosis is generally the result of a diseased heart. White, *ibid;* IV The Cyclopedia of Medicine 305. But medical authorities are in general agreement that a blood vessel could rupture in a normal heart and hemorrhage to such a degree that it would clot a coronary artery, producing a coronary thrombosis.

Now, is there a correlation between the bodily injury suffered by Kegley and cyanosis? The court in Fox concluded that sunstroke was the sole cause of death and, with this extremely important part of the puzzle solved, only had to determine if there was evidence on the exterior of the body which corresponded with the injury caused by the sunstroke.[12]

---

[11] Dr. Prout, who examined Kegley after the thrombosis, stated that he did not notice Kegley's lips being particularly blue, although he did observe a cyanotic parlor characteristic of all dead persons.

It has been said, however, that "Cyanosis of the skin and mucous membrane is a sign much sought for, but unless the cyanosis is well marked or constant it may be unimportant, since it often results from temporary local disturbances of the circulation and not from serious disease of the heart, lungs, and blood vessels." White, Heart Disease 58 (1956).

[12] The evidence included body temperature of 109, presumably accompanied by rapid pulse, hot dry skin, flaccid muscles, scarlet blotches on the face, nausea, palpitation, and under circumstances likely to produce a sunstroke.

Under Texas law, a death certificate properly filed is prima facie proof of the information therein contained. Tex. Rev. Civ. Stat. Ann. Art. 4477, rule 54a (1966). Kegley's death certificate identifies the cause of death as a coronary thrombosis. It can be presumed, therefore, that a coronary thrombosis was the sole cause of death.

Yet, without autopsy, what caused the coronary thrombosis is a matter for conjecture. The medical experts called by appellee testified that *assuming* Kegley had a normal heart, overexertion probably caused a blood vessel to rupture, leading to a coronary thrombosis. Since no autopsy was performed on the deceased, these medical witnesses built their opinion upon the assumption that the deceased had a normal heart, as stated by counsel in his hypothetical illustration. With this as an accepted fact, the medical experts then concluded that a blood vessel must have ruptured and that a coronary thrombosis caused the death.

Appellee adopted the ruptured blood vessel as the bodily injury received by Joseph Kegley, and it is appellee's position that the coronary thrombosis was caused by the ruptured blood vessel.

The instructions given by the trial court allowed the jury to choose between two possible proximate causes of the coronary thrombosis, disease or an accidental bodily injury. It is impossible, therefore, to determine which, if either, the jury found to be the sole proximate cause of death. The problem cannot be resolved by inductive reasoning, for cyanosis, the only evidence approximating a visible con-

tusion or wound, would correspond with a coronary thrombosis, whether caused by a ruptured vessel, disease, or a combination of the two.

Fox, therefore, is not authority for this court.[13] On the other hand, there is authority for this court to conclude that the Texas Supreme Court would not follow the principles laid down in *Fox*.[14]

Contrary to the district court's instruction, the Texas law is settled that terms used in an insurance policy are intended to be construed as commonly and ordinarily understood. *American Casualty Co. of Reading, Penn. v. Myrick*, 304 F. 2d 179, 183 (5th Cir. 1962); *Western Reserve Life Ins. Co. v. Meadows*, 261 S.W. 2d 554, 557 (Tex. 1953) *rehearing denied*; 32 Tex. Jur., *Insurance* §57 (1962).

[13] There are other reasons why American Nat'l Ins. Co. v. Fox should not be authority in this case. For one, the policy construed in *Fox* did not exclude coverage for internal injuries not evidenced by a contusion or wound on the exterior of the body. The policy would have covered such injuries if revealed by autopsy; but the Aetna policy would not. Secondly, *Fox* was concerned with death caused by heat from the sun (heat stroke), which is established under Texas law as an accidental bodily injury. The court in *Fox* said it was compelled to reach the result it did because the policy insured against heat stroke. Thirdly, the policy in *Fox* covered death caused by a bodily injury "effected solely through external, violent, and accidental means." In construing a policy similar to Aetna's, the Texas Supreme Court refused to consider as authority other Texas cases dealing with "external, violent, and accidental means" provisions. Mutual Benefit Health & Accident Ass'n. v. Hudman, 398 S.W. 2d at 113.

[14] In Pan American Life Ins. Co. v. Andrews, 340 S.W. 2d 787, 791 (Tex. 1960), a double indemnity provision required a visible contusion or wound on the body (or internal injury revealed by autopsy). The court, with reference to death from poison, asphyxiation and drowning (agents which act internally and normally produce blue lips), said: "These agents, of course, *do not leave visible contusions or other outward marks*. . . ." (Emphasis added.) Without an autopsy, the court reasoned, there could be no recovery for injuries caused to internal organs of the body without any visible contusions or wounds.

With no Texas authority on point, the court must determine if cyanosis is, as a matter of law, a contusion or wound, as those terms are commonly understood.

As previously defined, a contusion is ordinarily understood to be a bruise without a break in the skin, and a wound is understood to be an injury accompanied by a break in the skin. Cyanosis is described as a blueness of the skin or mucous membrane resulting from a deficiency of oxygen in the blood. While cyanosis may appear in the lips after a ruptured artery has caused a coronary thrombosis, neither the medical experts who testified at the trial nor the authorities encountered in the court's research equate cyanosis and a visible contusion or wound. Indeed, by definition, cyanosis is not a contusion or wound.

Dr. Prout, who examined Kegley and filled in the death certificate, responded to the following questions:

"Q. The cyanotic pallor associated with death is not due to a contusion or wound, this is correct, isn't it?

"A. Yes, sir.

"Q. It is just a grayness in color and is common to a great majority of deceased persons,

"A. Yes, sir.

Dr. McDaniel, another medical witness who testified at the trial, agreed with Dr. Prout's statement:

"Q. All right, is cyanosis the same thing as a wound or contusion?

"A. No."

The blueness observed in the deceased's lips was but an indication of what may have been either an internal bodily injury, a contusion or a wound; possibly a visible sign or mark, but not itself a contusion or wound.

Legal authorities and courts have refused to recognize cyanosis as a visible contusion or wound on the exterior of the body. *Massachusetts Mutual Life Ins. Co. v. Pistolesi*, 160 F. 2d 668, 670 (9th Cir.), *cert. denied*, 332 U.S. 759 (1947); *Paul Revere Life Ins. Co. v. Stanfield*, 151 F. 2d 776, 777, (10th Cir. 1945) *cert. denied*, 327 U.S. 795 (1946); 1 A Appleman, Insurance Law and Practice §395 (1947); 10 Couch, Insurance §41: 781 (1962).

As a matter of law, cyanosis is not a visible contusion or wound on the exterior of the body, as those terms are normally understood and as intended in the policy. Therefore, there being no evidence of a contusion or wound upon the exterior of the body, the death did not come within the terms of the policy, and appellee cannot recover.

The judgment of the trial court is reversed, and the case is remanded, with directions to enter judgment for the defendant.

APPENDIX B

UNITED STATES COURT OF APPEALS

For the Fifth Circuit

October Term, 1966

No. 23437

D. C. Docket No. CA 3793

AETNA LIFE INSURANCE COMPANY,

Appellant,

versus

JUNE KEGLEY, a Widow,

Appellee.

Appeal from the United States District Court for the Western District of Texas.

Before BELL and GODBOLD, Circuit Judges, and NOEL, District Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is

hereby, reversed; and that this cause be, and the same is hereby remanded with directions to the said District Court in accordance with the opinion of this Court.

It is further ordered and adjudged that appellee, June Kegley, a widow, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

Issued as Mandate: OCT 17 1967

August 15, 1967

Court Costs:

Docketing cause, etc.	$25.00
Cost of Printing Record	$1830.00
Total	$1855.00

APPENDIX C

U. S. Court of Appeals
F I L E D
OCT 9 1967
Edward W. Wadsworth
Clerk

In the

UNITED STATES COURT OF APPEALS

For the Fifth Circuit

No. 23437

AETNA LIFE INSURANCE COMPANY,

Appellant,

versus

JUNE KEGLEY, a Widow,

Appellee.

Appeal from the United States District Court for the Western District of Texas"

ON PETITION FOR REHEARING EN BANC

(October 9, 1967)

Before BELL and GODBOLD, Circuit Judges, and NOEL, District Judge.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular service on the Court having requested that the Court be polled on rehearing en banc, Rule 25(a), subpar. (b), the Petition for Rehearing En Banc is DENIED.

APPENDIX D

No. 23,437

In the
UNITED STATES COURT OF APPEALS
For the Fifth Circuit

AETNA LIFE INSURANCE COMPANY,
Appellant,

v.

JUNE KEGLEY, a Widow,
Appellee.

Appeal from the United States District Court for the Western District of Texas

Before BELL & GODBOLD, Circuit Judges, and NOEL, District Judge.

ORDER RECALLING AND STAYING JUDGMENT ISSUED AS MANDATE

ON CONSIDERATION of the petition of Appellants for recall and stay of judgment issued as mandate in the above numbered and entitled cause, to enable appellants to apply for and obtain a writ of certiorari from the Supreme Court of the United States, IT IS ORDERED that the judgment

issued as mandate to the Clerk of the United States District Court, at Pecos, Texas, on August 15, 1967, be recalled and stayed for a period of thirty days, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the clerk shall issue the judgment as mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from the date of this order, unless the above mentioned certificate shall be filed with the clerk of this court within that time.

/s/ JAMES NOEL
United States District Judge

Dated this 8th day of December, 1967.

(ORIGINAL FILED—DECEMBER 11, 1967)

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JOHN F. DAVIS, CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1967

No. 939

JUNE KEGLEY, a Widow,

Petitioner,

v.

AETNA LIFE INSURANCE COMPANY,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETTTION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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In the

Supreme Court of the United States

OCTOBER TERM, 1967

No. 939

JUNE KEGLEY, a Widow,

Petitioner,

v.

AETNA LIFE INSURANCE COMPANY,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondent, Aetna Life Insurance Company, opposes the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit. The opinion and decision of the Court of Appeals was correct. The petition should be denied.

STATEMENT

This suit was brought against Aetna Life Insurance Company by petitioner-plaintiff, June Kegley, the surviving widow and beneficiary of Joseph Felix Kegley, deceased,

to recover special accidental death benefits under the provisions of a group insurance policy issued to deceased's employer. Petitioner's husband died after suffering a heart attack, described by medical witnesses as a coronary thrombosis or a coronary occlusion (R. 155, 178, 310, 376). The policy involved expressly limited payment of death benefits to those situations where the insured (1) suffered a bodily injury (2) caused by an accident (3) and as a direct result of such injury and to the exclusion of all other causes sustained death (4) with the injury being evidenced by one or more visible contusions or wounds on the exterior of the body (R. 36, 38, policy introduced in evidence at p. 210).

Although several specifications of error were presented in the court below by respondent (appellant in the court below), the Court of Appeals only determined: first, that the district court's instructions to the jury regarding the cause of death were not in conformity with the law of Texas nor the language of the insurance policy involved; and second, that the district court's instructions with respect to the policy requirement of "visible contusions or wounds on the exterior of the body" were also erroneous and that, as properly defined, there was no evidence to satisfy such requirement. Contrary to petitioner's statements, the Court of Appeals did not attempt to determine the cause of death, did not pass upon the evidence bearing upon whether or not the deceased sustained a bodily injury caused by an accident, and did not deprive the petitioner of a jury trial on any question of fact.

REASONS THE WRIT SHOULD BE DENIED

1. The Court of Appeals properly construed and applied Texas Authorities in deciding this case.

The policy involved, as a condition precedent to recovery, expressly requires that any bodily injury sustained by the deceased-insured be "evidenced by one or more *visible contusions or wounds on the exterior of the body,* except in the case of drowning" (R. 36, policy introduced in evidence at p. 210). The burden was thus cast upon petitioner-plaintiff to produce evidence to satisfy this condition or requirement and, in this, the petitioner totally failed. The *only* evidence introduced upon trial in this connection was that the deceased's lips, or area around the lips, turned blue after the attack (R. 95-97, 105, 134-135, 196-197). No one disputed this testimony. This blue condition was identified by medical witnesses as cyanotic pallor, or cyanosis, a characteristic of all dead persons (R. 196-197, 317-318), particularly where a heart attack is involved (R. 385). The medical witnesses further identified a "contusion" as a "bruise" (R. 201, 322, 383) and a "wound" as a separation, dissolution or disruption of tissue (R. 201, 321, 382-383). It was agreed in the testimony that there were no bruises, contusions or wounds about the body of the deceased (R. 97, 103, 230, 201-202), and that cyanosis is not itself a contusion or wound (R. 197, 317-318).

The only evidence which petitioner can single out is the statement of a Dr. Homan that the purple discoloration of the lips can be outward visible evidence of an internal damage or injury to the heart. But this statement misses com-

pletely the policy condition or requirement of *contusions or wounds on the exterior of the body* and even Dr. Homan admitted there is a distinction between the coloration of cyanosis on one hand and wounds and contusions on the other (R. 381-385). In short, there was absolutely no evidence on the exterior of the deceased's body of any visible "contusion or wound" as those words are commonly understood. There was no evidence for the jury to weigh and no facts to be considered pertaining to this policy condition.

The trial court's instruction to the jury, however, actually removed this condition from the policy by equating the policy requirement of visible contusions or wounds with visible marks and further instructed the jury that blue lips satisfied the policy requirements as a matter of law. Petitioner attempts to do likewise to compensate for the lack of evidence on this point.

Generally speaking, there are two types of clauses of the nature here involved. One type requires a sign or mark of injury on the exterior of the body while the other type, as in the instant policy, requires a visible contusion or wound on the exterior of the body. Under the former type, most any visible abnormality will satisfy the requirement—a pale and sickly look, vomiting and retching, passing of unnatural substances, discloration of the skin, shrinkage of muscles or emaciation. 39 A.L.R. 1011, 45 C.J.S. Insurance, Sec. 755, p. 784; *Royal Casualty v. Nelson*, 153 S.W. 674 (Tex. Civ. App. 1913, no writ hist.).; *Hawkinson v. Order of United Commercial Travelers*, 20 S.W. 2d 101 (Tex. Civ. App. 1929, no writ hist.).

The second type clause, requiring a visible contusion or wound, is much more restrictive. The distinct difference in the clauses and their requirements is made plain in *Travelers Ins. Co. v. Ansley*, 124 S.W. 2d 37 (Ct. App. Tenn. 1938, cert. den., on subsequent appeal 173 S.W. 2d 702). The court there said that under a policy requiring only a visible sign or mark, any sign of the injury such as a pale or sickly look in the face, will satisfy the requirement. In the type clause with which we are concerned, however, the Tennessee court recognized that the limits of the required evidence are narrowed and stated at p. 42:

> "In other words under the one provision any manifestion of the injury which can be properly classified as a sign or mark thereof is sufficient to meet its requirements, whereas, under the other, the parties agree upon the kind of sign or mark, namely a bruise or contusion that must exist on the exterior of the body before liability is incurred."
>
> "In this view every external wound or contusion may be a sign or mark of an internal injury not otherwise apparent to the eye but we think it is clear that every physical sign or mark of such an injury is not necessarily a wound or contusion as the words are commonly understood."

This case seems to declare only what is obvious and comport with common sense.

The weight of authority from other jurisdictions recognizes this difference in the two type clauses and supports the conclusion that here there was no contusion or wound on the exterior of the insured's body. *Paist v. Aetna Life Insurance Co.*, 60 F. 2d 476 (3d Cir. 1932); *Paul Revere Life Ins. Co. v. Stanfield*, 151 F. 2d 776 (10th Cir. 1945, cert.

den'd, 327 U.S. 795); *Massachusetts Mut. Life Ins. Co. v. Pistolesi*, 160 F. 2d 668 (9th Cir. 1947, cert. den'd, 332 U.S. 759) (blue lips from coronary thrombosis); *Stirk v. Mutual Life Ins. Co. of New York*, 199 F. 2d 874 (10th Cir. 1952); *Voelker v. Combined Insurance Co. of America*, 73 S. 2d 403 (Fla. Sup. 1954); *Life & Casualty Ins. Co. of Tennessee v. Brown*, 99 S.E. 2d 98 (Ga. Sup. 1957) (blue tint to skin from brain injury); *Hill v. Woodman of the World Life Ins. Society*, 142 S.E. 2d 869 (S. Car. Sup. 1965) (cyanosis from heart attack).

There is no definitive decision by the Texas Supreme Court with respect to this particular requirement of visible contusions or wounds. However, that court has furnished certain clear indications and guidelines of the course it is likely to follow. From these indications and other available data to be considered by the federal court, *Putman v. Erie City Manufacturing Company*, 338 F. 2d 911 (5th Cir. 1964), note 5, the course is clear that in Texas cyanosis does not satisfy the policy requirement of contusions or wounds.

In *Pan American Life Insurance Co. v. Andrews*, 161 Tex. 391, 340 S.W. 2d 787 (Tex. Sup. 1960), the problem was not squarely raised but the opinion does show the course of the Supreme Court of Texas. In this case there were two policies of insurance involved, both of which, in effect, insured against bodily injuries effected through external, violent and accidental means, of which there is a visible contusion or wound on the body, except in the case of drowning or internal injuries revealed by autopsy. The Texas court, in

discussing the opinion of a Washington court which allowed recovery under an accident policy for a cerebral hemorrhage or stroke produced by fright stated, at p. 791:

> "Certainly the plaintiff in that case would not have recovered if the policy had excluded 'bodily injuries of which there is no visible contusion or wound on the exterior of the body and no internal injuries revealed by autopsy.'"
>
> * * *
>
> "These agents (referring to poison, asphyxiation and drowning), of course, do not leave any visible contusions or other outward marks, but do bring to bear physical force upon the body and may be revealed by autopsy."

and at p. 792:

> "The provision for autopsy is to afford the opportunity for establishing the fact that death was caused by a physical force where there was no outward manifestation on the body of that force. Otherwise, no recovery could be had for an accidental death caused by taking into the body poisonous substances or for other injuries sometimes caused to internal organs of the body or by external physical force without any visible contusion or wound."

This case recognizes that ordinary signs of death are not contusions or wounds and that it is possible to have some injury involving the internal structure of the body without the presence of any contusion or wound on the exterior of the body. Most every injury or illness will leave some sign—perspiration, blue lips, etc. Dr. Ralph Homan, a witness offered by the petitioner, stated that cyanosis or blue lips can come about as a consequence of drowning or of asphyxiation (R. 384). Referring to the court's opinion in *Pan American*

Life Insurance Co., (p. 791, above quoted), it is apparent that the blue lips or cyanosis resulting from asphyxiation or drowning would not satisfy the policy requiements of a visible contusion or wound. In short, blue lips customarily associated with death is not such a visible contusion or wound as can satisfy the condition precedent to recovery in this case.

An earlier Texas case by a Court of Civil Appeals, *American Nat'l Ins. Co. v. Fox*, 184 S.W. 2d 937 (Tex. Civ. App. 1944, error ref'd, w.o.m.), not the Texas Supreme Court, discussed contusions and wounds and marks or signs. Petitioner complains because the court below, after careful search, determined that *Fox* should not be authority in this case and that the Texas Supreme Court would decide differently. In making this determination, the opinion of the court below, written by a Texas judge, properly distinguished and declined to follow *Fox* because (a) of the differences in the evidence in this case and *Fox*, particularly as to the cause of the injury and death; (b) the differences in the wording of the policies involved; and (c) legal authorities indicating that the Texas Supreme Court would not follow *Fox* (p. 14-19 of the court's printed opinion; p. A-12 to A-16 of the opinion attached to the Petition for Writ).

Equally as important as the foregoing reasons for concluding that *Fox* was not authority in this case and that it does not represent the view of the Texas Supreme Court is the well settled Texas law that terms used in a contract of insurance, if not defined in the policy, are to be given their ordinary, usual, common or generally understood meaning.

United States Insurance Co. of Waco v. Boyer, 269 S.W. 2d 340 (Tex. Sup. 1954); *Western Reserve Insurance Co. v. Meadow*, 261 S.W. 2d 554 (Tex. Sup. 1953); *Guardian Life Insurance Co. of America v. Scott*, 405 S.W. 2d 64 (Tex. Sup. 1966); *American Casualty Co. of Reading, Pa. v. Myrick*, 304 F. 2d 179, 183 (5th Cir. 1962). By way of definitions, a contusion is ordinarily understood to be synonymous with bruise or an injury which affects subcutaneous tissue without breaking the skin. Vol. 9A, *Words and Phrases*. A wound is described as an injury where the skin or other membrane is broken. *Life and Casualty Ins. Co. of Tennessee v. Brown, supra;* see also, *Zorn v. Aetna Life Insurance Co.*, 260 F. Supp. 730, at 733 (E.D. Tex. 1965). The testimony of all of the medical witnesses closely conformed to these usually accepted definitions (R. 201, 321-322, 382-383). "Wounds and contusions" then, as commonly and ordinarily understood, do not include cyanosis.

From the available authorities, the conclusion is inescapable that *Fox* has no application to this case and that the Texas Supreme Court would not follow *Fox* but would hold that a requirement of "visible contusions or wounds" could be satisfied only by a bruise or by an injury in which the skin or membrane is broken—not a mere mark or sign of death, such as cyanosis. Having thus properly construed the words used in the policy, the court below examined the evidence and found absolutely none to satisfy this requirement. It was proper to direct entry of judgment for respondent. The *Erie* doctrine was not ignored or violated but

was expressly recognized and followed by the court below (see p. 14 of the court's printed opinion and p. A-12 of the opinion attached to the Petition for Writ).

2. The Court of Appeals did not violate Petitioner's rights under the Seventh Amendment to the Constitution of the United States.

In directing the district court to enter judgment for the respondent, the Court of Appeals did not deprive petitioner of a trial by jury in violation of the Seventh Amendment. The Constitution does not create evidence where there is none. In this case, there simply was no evidence of a contusion or wound on the exterior of the body. The jury had nothing to pass on.

In every jury case, there is a preliminary question for the judge whether there is any evidence upon which a jury can properly proceed to find a verdict for the party producing it and upon whom the burden of proof rests. *Gunning v. Cooley*, 281 U.S. 90, 94, 50 S. Ct. 231, 74 L. Ed. 720 (1930). The power of the courts to pass upon this question of law is just as much a part of the process of trial by jury at common law guaranteed by the Seventh Amendment as is the power of the jury to pass upon controverted issues of fact. *Diederich v. American News Co.*, 128 F. 2d 144 (10th Cir. 1942).

The Court of Appeals for the Fifth Circuit stated in *Buffalo Insurance Company v. Spach*, 277 F. 2d 529 (5th Cir. 1960), at p. 531:

> "We are aware of the provisions of the Seventh Amendment and of the Federal Rules of Civil Procedure,

> rule 38(a), 28 U.S.C.A., which require the submission to juries of questions of fact in dispute, or questions of conflicting inferences from undisputed facts. However, in the absence of probative facts, supporting by reason, the conclusion expressed in the verdict, the question is one for the court rather than the jury. Myer v. Reading Co., 331 U.S. 477, 67 S. Ct. 1334, 91 L. Ed. 1615; Beuter v. Eastern Air Lines, 5 Cir., 1955, 226 F. 2d 443."

The power of the federal courts to direct a verdict for insufficiency of evidence has long been recognized. *Galloway v. United States*, 319 U.S. 372, 63 S. Ct. 1077, 87 L. Ed. 1458 (1943). The Court of Appeals here correctly exercised that power regardless of whether the sufficiency of the evidence be tested by a federal standard or a state standard. As stated in *Galloway, supra*, at 319 U.S., p. 395:

> "Whatever may be the general formulation, the essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked."

See also, *American Casualty Co. of Reading, Pa. v. Myrick, supra*, at 182-183.

Cyanosis was the only evidence approximating a contusion or wound. Since cyanosis is not "visible contusions or wounds on the exterior of the body", there was no evidence to meet the express requirements of the policy and there was no error in directing entry of judgment for respondent.

3. There is no special or important reason for reviewing this case.

It is overly dramatic to claim, as does petitioner, that the decision in this case will affect millions of policyholders whose bread winners might suffer death. There certainly is no evidence in the record supporting this statement in any manner. The opinion of the Court of Appeals simply confirms the integrity of commonly used and understood words of the English language.

4. The opinion of the Court below is not in conflict with applicable legal authorities.

It is difficult to determine the exact errors urged in petitioner's fourth Reason For Granting Writ. At pages 22-24 of the petition, it is apparently claimed that the Court of Appeals held the deceased did not sustain a bodily injury caused by accident. At pages 30-35 and 38-39, petitioner seems to contend the Court of Appeals held there was no fact issue as to the cause of death, i.e., disease or bodily injury caused by accident. This is erroneous. The Court of Appeals made neither such holding urged by petitioner.

The Court of Appeals did hold that the instructions given by the district court with respect to the cause of death were erroneous. The opinion points out that the policy, fairly construed, limits recovery to those situations where death results *solely* from bodily injury caused by an accident to the exclusion of all other causes such as pre-existing disease, while the instruction of the district court permitted recovery where death resulted from a number of concurring or contributing causes, including pre-existing disease. In

short, it was held that the instructions permitted recovery in situations not covered by the policy and that the instructions misplaced the burden of proving the cause of death. The Court of Appeals did not attempt to weigh or determine the sufficiency of the evidence with respect to cause of death, but *expressly* reserved this issue for consideration by the jury under proper instruction. See pages 10-12 of the court's printed opinion and pp. A-9 and A-10 of the opinion attached to the Petition for Writ. The Court of Appeals did not even write on the question of whether or not the deceased sustained a bodily injury caused by an accident. It was unnecessary to do so on the basis on which the case was decided. The interjection of these claims by petitioner serves only to confuse the matters presented to this court. The turning point in the opinion of the Court of Appeals is the holding that cyanosis is not a wound or contusion.

CONCLUSION

The Court of Appeals properly disposed of this case.

1. The opinion of the Court of Appeals is not in conflict with applicable Texas authorities.

2. Since there was a total lack of evidence that any bodily injury sustained by the insured was evidenced by a contusion or wound on the exterior of the body, the death of the insured did not come within the terms of the policy and the Court of Appeals properly directed entry of judgment for respondent.

3. The action by the Court of Appeals did not deny petitioner a trial by jury of any issue of fact raised by the

evidence nor violate petitioner's rights under the Seventh Amendment to the United States Constitution.

4. The matters presented for review are neither special nor important except in this case.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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W. O. Shafer

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CERTIFICATE OF SERVICE

Copies of the foregoing Brief of Respondent in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit have been delivered to counsel for Petitioner by posting same in the United States mail, postage prepaid, addressed on this the 16 day of January, 1968.

W. O. Shafer

W. O. Shafer